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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-422

E. C. DOTHARD, ET AL.,
APPELLANTS

VS.

BRENDA M. MIETH, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF APPELLANTS

OPINION BELOW

The opinion and order of the three-judge district court for the Middle District of Alabama in the case at bar appears as *Mieth v. Dothard*, 418 F. Supp. 1169 (M.Ala. 1976) (Jurisdictional Statement, Appendixes A and B) (R. 1262, 1285).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1253.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This appeal involves amendments nine, ten and fourteen of the United States Constitution; 42 U.S.C.,, §2000e, §2000e-2; Title 55, §373(109), Code of Alabama (1940) (Recomp. 1958); and Administrative Regulation 204 of the Alabama Board of Corrections. These provisions are reprinted in Appendix *infra*.

STATEMENT UNDER RULE 33(2)(b)

Since this proceeding draws into question the constitutionality of 42 U.S.C., §2000e, §2000e-2, as amended, Acts of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C., §2403 may be applicable.

No court of the United States as defined by 28 U.S.C., §451 has, pursuant to 28 U.S.C., §2403, certified to the Attorney General the fact that the constitutionality of such Acts of Congress have been drawn in question.

QUESTIONS PRESENTED FOR REVIEW

I. Whether The Enacting Powers Of The Congress Uphold A standard Of Review of State Statutes In Cases Of Claimed Sex Discrimination Different From The Standard Under The Equal Protection Clause Of The Fourteenth Amendment.

II. Whether Traditional Equal Protection Analysis Upholds The Validity Of A Height/Weight Requirement For State Law Enforcement Officers.

III. Whether Traditional Equal Protection Analysis Upholds The Validity Of A State Administrative Regulation Requiring That The Guard Positions In Physical Contact With Prison Inmates Be Filled By Guards Of Like Sex To The Inmates.

VI. Whether A Prima Facie Case Of Sex Discrimination Under Title VII From a Height And Weight Requirement May Be Shown By Showing A Statistical Disparate Effect On The General Population Of Women.

V. Whether The Job Of Law Enforcement Per Se Justifies An Employment Criteria Based Upon Height And Weight.

VI. Whether An Administrative Regulation Which Prohibits Male And Female Guards Alike From Serving In Contact Positions With Inmates Of The Opposite Sex Is Prima Facie Discriminatory Under Title VII.

VII. Does The Job Of A Prison Guard In A Penitentiary Who Is In Daily Physical Contact With The Inmates Justify A Bona Fide Occupational Qualification Requiring Those Guards To Be The Same Sex As The Inmates?

STATEMENT OF THE CASE

INTRODUCTION

This case is before this Court on direct appeal from an order of a Three-Judge District Court which enjoined the enforcement of both a state statute and an administrative regulation. The statute in question is Title 55, §373(109), Code of Alabama, (1940) (Recomp. 1958), which established the minimum standards for law enforcement officers. Para-

graph (d) of that subsection prescribes minimum height and weight requirements which affect the job of correctional counselor. The provisions of paragraph (d) require that the applicant be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician as in good health and physically fit for the performance of his duties. The court below found these qualifications to be sexually discriminatory in violation of Title VII, Civil Rights Act, 1964, toward the class of individuals represented by appellee, Diane K. Rawlinson, and enjoined the further enforcement of these requirements.

In addition to the above-minimum requirements, the Board of Corrections was further enjoined from enforcement of the Board's Administrative Regulation Number 204. That Regulation, being based on the advice of counsel for the Federal Equal Employment Opportunity Commission, provides for the determination and designation of bona fide occupational qualifications regarding sex in the field of correctional officers. The Regulation was declared invalid under both Title VII and the Equal Protection Clause of the United States Constitution. The case originally encompassed another class action challenging the policies of the Department of Public Safety as sexually discriminatory under the fourteenth amendment. The plaintiff also prevailed in that action, however, the party defendant to that action chose not to appeal. We will therefore direct the Court's attention only to the facts pertaining to the challenge by Ms. Rawlinson.

The appellant would submit that the subjective judgments involved below make the facts of this case especially important. They will therefore be stated with a greater degree of specificity than would generally be the case. Furthermore, the testimony was taken by deposition and covered a period of six to eight weeks. To minimize confusion we will therefore state the facts in the sequence in which the depositions were taken.

TESTIMONY TAKEN

The deposition of plaintiff's expert witness, Mr. C. Robert Sarver, was taken on February 16, 1976. Mr. Sarver testified that he had had experience in the corrections field, as Director of Corrections in West Virginia and Arkansas. Based on this experience he contended that minimum height and weight requirements for prison guards bore no relation to work performance. Additionally, he stated that women could perform equally as well as men in those positions even at an all-male institution.

However, on cross-examination, and to some degree on direct examination, Mr. Sarver freely admitted that he had never supervised women guards. He further admitted that neither Arkansas or West Virginia used women in those positions. His proposed reason for this was that he did not have any female applicants who were interested in employment in those positions. Furthermore, Mr. Sarver admitted that he had never made any study on a woman's ability to function as a prison guard. (A. 87). He did testify, however, that women other than guards had been in the institutions under his control, and that the male guards were always nervous under these conditions. (A. 86). His testimony disclosed that he had observed women guards in an all-male institution only at a county jail in Jacksonville, Florida. (A. 87). He said that the facility was a lock-up type, and much different from the dormitory-style facilities in Alabama. Sarver then testified that the dormitory-style in-

stitution was much more difficult to control. (A. 94). He indicated that his opinions were based partly on visiting many different prisons on behalf of inmates for whom he had testified. (A. 77).

On March 3, 1976, the plaintiff, deposed the defendant Judson C. Locke, Commissioner of the Alabama Department of Corrections. Locke testified that he entered the employment of the Department of Corrections in 1957 and became Commissioner in October, 1975. Mr. Locke testified that a correctional counselor, as that term is used in Alabama, performs the work of a prison guard. The function of his job is primarily to provide security in the institution. (A. 100). Due to the shortage of man power, a corrections counselor is expected to work in any position where he is assigned, and must be capable of performing strip searches, shakedowns and physically subduing inmates. (A. 101-102).

During the examination, Commissioner Locke was asked to state the reasons why he thought women should not be placed in contact positions in all-male institutions as is prohibited by the challenged Board Regulation. He testified that the correctional counselor should be capable of physically subduing an inmate, or protecting herself against an inmate; that her physical presence would incite inmates confined in an all-male environment with no hetrosexual outlets; (A. 111), and that from his experience in supervising women at male institutions he has found that the inmates show disrespect for female personnel thereby presenting a control problem. (A. 112, 131, 147).

In defense of these allegations, Commissioner Locke testified that the need always exists in the maximum security institutions, to have the capability to subdue an inmate (A. 113). He pointed out that forty (40) assaults have been

made on correctional personnel in the past three (3) years and that two such assaults resulted in the deaths of prison guards (A. 119). Even the simple assaults were noted to have caused the infliction of wounds. (A. 120). Furthermore, the Commissioner noted that Alabama operates dormitory-type institutions, and that placing women in contact positions would require that they inspect latrines, conduct strip searches, and view living and bathing areas. He contended that these activities would invade an inmate's right to privacy. (A. 132-133). Moreover, he submits that twenty (20%) percent of the inmate population are sex offenders, who are scattered throughout the system. (A. 149). As further justification for his opinion Locke stated that an inmate assaulted a female member of the prison staff, with intent to ravish, approximately one week prior to his deposition. (A. 142). In addition to that incident, a female student was taken hostage during a college tour of the Draper unit in 1972. (A. 143). Based on these and other experiences, Commissioner Locke stated that if females were placed in these positions as guards it would cause an increased burden on the male officers to provide security for female counselors. (A. 150).

Regarding the minimum height and weight requirement in the Alabama statute, Commissioner Locke testified that even though the minimum requirement for height and weight was five feet two inches tall, and one hundred twenty pounds, he would prefer a larger person if available. (A. 139). Furthermore, he testified that he was not aware of any system that had no minimum height and weight requirements. (A. 140).

The plaintiff also deposed James Jackson on March 3, 1976. Mr. Jackson testified that he was the Director of the Alabama Law Enforcement Standards and Training Com-

mission. In this position he administers the minimum standards provided for under Alabama law, and reviews request for waivers of the minimum standards. He recalled that he had granted four or five such waivers including a minimum weight waiver to one female. (A. 163). To his recollection however, a person under 5'2" tall had never applied for the waiver (A. 172). Jackson explained that the procedures for a waiver request were initiated by a written request from either the hiring agency or the individual involved. (A. 165). Once he receives the request, he reviews it and grants the waiver if the person's height and weight are reasonably proportional. (A. 166). He stated that he determines this proportionality in the same fashion a doctor does with a chart. (A. 166). He readily admitted that no formal forms or procedures are involved in this administrative review. (A. 165).

The next witness deposed was Ms. Dianne K. Rawlinson, who testified that she was a college graduate who majored in correctional psychology. She further testified that she did research work for various professors and worked part time with the Tuscaloosa City Police Department. Ms. Rawlinson stated that she had no physical defects, was 5'3" tall and weighed 115 pounds. Prior to her graduation, she applied for employment with the Alabama Department of Corrections but her application was rejected because she failed to meet the minimum weight requirement of 120 pounds. (A. 173). Ms. Rawlinson stated that she did not apply for waiver of the requirements (A. 176). She later instituted this action and shortly thereafter received her "right to sue" letter.

Mr. William Nelson was deposed by the plaintiff on March 19, 1976. He testified that he was the Warden of the Metropolitan Correctional Center, Chicago, Illinois and had had twenty years experience in corrections. Mr. Nelson

said that the Metropolitan Correctional Center, which he presently directed, housed approximately 275 inmates with the major portion of them being pre-trial inmates awaiting transfer. (A. 179, 180). A further description of the center indicated that each prisoner had a separate cell. (A. 201). Also, the toilet facilities were only partially visible from the living area and the showers were completely private with no outside observance. (A. 215, 216). The facility is not a penitentiary. Nelson further testified that the system there employed women correctional officers with no minimum height or weight requirements. The only physical requirements are that height and weight be proportional. (A. 182). He stated that the duties performed by both male and female officers were similar but that female officers were not allowed to perform strip searches on a man. (A. 184).

On cross-examination, Mr. Nelson testified that he has had only six months experience with women correctional officers in a male institution. (A. 193). He stated that the results he perceived were generally favorable. However, when defense counsel described the conditions that prevailed in the Alabama prison system, Mr. Nelson stated that he would have serious reservations about placing women in contact positions in that type situation. (A. 196). Furthermore, he testified that the Metropolitan Correctional Center is composed of lock-up rooms, even for the minimum security areas, (A. 201), and that sex offenders constituted less than two percent of the inmate population. (A. 203). He said that it would be an inappropriate place for a female if ten percent of the prison population were sex offenders, and not isolated. (A. 204).

When asked about the advantage of physical strength for correctional officers, Mr. Nelson noted that in his institution, strength would not be that important. (A. 210).

He did agree however that there came a point where a person is simply too small to be effective. (A. 211). Furthermore, he admitted that if all qualifications were equal among two prospective guards, he would choose the larger person. (A. 212). His testimony also disclosed that even though female guards were used at minimum security male prisons the policy of the Federal Bureau of Prisons did not include the hiring of females in penitentiaries because of the difference in structural design of the facilities and types of inmates housed there. (A. 214-215). Moreover, Mr. Nelson testified that he would find it difficult for women officers to work in an open-type dormitory penitentiary. (A. 216).

On March 31, 1976, the defendants deposed Mr. Tony Sewell. He testified that he was the director of the Mobile work release center which is part of the Alabama prison system (A. 247). He stated that the men there are minimum security prisoners and supposedly the best inmates in the Alabama penal system. The actual facility was described as resembling a dormitory housing establishment, which accommodates forty-six (46) inmates. (A. 249). The bathing and toilet facilities at the center are not open to view.

Seven correctional officers are assigned to the work-release center, two of which are female. (A. 250-251). Their duties involve head count, social and personal counseling, job placement, group and individual counseling, and, quite frequently, shakedowns. (A. 250). Female counselors are not allowed, for reasons of inmate privacy, to go into the rest-room area while in use. This situation has caused head counts to be made in certain instances by voice identification (A. 253). This has caused some problems due to inmate manipulation of this system. Sewell stated however, that no problem of assaults on the female counselors had occurred. He emphasized in this regard that the inmates had available

sexual outlets through a weekly furlough. He did note in passing, however, that rumors of misconduct between female correctional officers and male inmates were prevalent. (A. 256-257, 272). Other problems noted in the use of female counselors at the center include the fact that the females are not allowed to participate in physical searching the male inmates. (A. 262). This requires that a male officer's time always has to be arranged so that he can aid a female officer on duty. This has caused an overload on the male officers. (A. 264).

The next witness deposed was Mr. Bill Gilmore who is the Director of Frank Lee Youth Center within the Alabama Correctional System. (A. 282). His previous correctional experience includes service as a warden of a maximum security institution. (A. 283). In describing his present assignment, Gilmore stated that Frank Lee Youth Center is a minimum security institution for male youths whose ages must be under twenty-three years. The youths housed there cannot be violent criminals. (A. 286). In short, it is a school camp for young inmates. (A. 287), with an open-type dormitory structure.

Gilmore testified that the Youth Center employes several female correctional counselors whose duties are similar to the male personnel. These duties include patrolling the dormitories, making head counts throughout the day and night, and conducting periodic shakedowns. (A. 289). Mr. Gilmore testified that he had observed these women for two and one-half years and has found that their performance as a whole is not as effective as the male officers. (A. 290). He expressed concern about their surveillance techniques, and the unwillingness of the inmates to carry out their instructions. (A. 291).

His experience indicated that the instructions given by male officers are obeyed promptly, but those given by female officers are not obeyed without some degree of harsh action. (A. 291). Additionally, women will not conduct complete surviellance of the bathrooms and more private areas, due to their personal embarrassment, even though this is of extreme importance in the attempt to quash homosexuality and drug use. (A. 303). Moreover, these problems with use of female counselors have caused the male officers to complain that they have a double workload. (A. 305). Other problems have also been manifested by sexual gestures toward female counselors.

Despite the criticism of females, Mr. Gilmore testified that female correctional counselors could be used effectively at the youth center if on a smaller percentage to the entire counselor force. (A. 297).

Defense counsel further questioned the witness on his prior experience as warden of Kilby Correctional Center, a maximum security institution. Gilmore stated that in his opinion a woman correctional counselor would, herself, be in physical danger in a contact job within such an institution. He was obviously opposed to any contention that a female counselor would be effective in such an environment.

OTHER EVIDENCE

Due to the fact that the proceeding below was conducted entirely by deposition, items of evidence other than testimony were submitted to the court either as exhibits to those depositions or in a written "Offer of Evidence". Additionally, both sides by motions, requested the court below to take judicial knowledge of various factors. Items offered in such fashion which are of particular interest here include a statistical survey showing a sexual breakdown within the workforce in Alabama. Other census figures were offered as well, showing height and weight disparities between male and females in Alabama.

SUMMARY OF ARGUMENT

Congress received its power for the enactment of Title VII primarily from the commerce clause. In 1972, the act was amended to include all state activities with this coverage not being limited solely to activities affecting interstate commerce. Therefore, the power for such an amendment could only be derived from the enabling clause of the fourteenth amendment. Furthermore, since that amendment proscribes inequality of protection, the preferential protection of the five special classes under Title VII cannot be justified by any power granted by virtue of that amendment. Title VII's blanket application to all state activities is therefore an unconstitutional extension of congressional authority and void in that respect. Such an extension is not justifiable on the basis of "affirmative action equality" since the act gives no preference to a particular race, sex, color, origin, or religion, but merely proscribes the use of those criteria in an employment decision regardless of the effect.

Title VII also poses impermissible restrictions on ninth and tenth amendment rights. The onerous burden placed upon private employers by the present application of Title VII is unjustified. The intrusion into private profit related decisions in nearly every employment decision severely restricts contractual rights and requires the employer to affirmatively defend nearly every employment decision upon the most frivolous of challenges.

Furthermore, even if Title VII has valid application to the states, its present mode of application restricts tenth

amendment rights. A state defendant is treated the same as an individual defendant under Title VII. A state should have no greater burden to justify its statutes than by showing a reasonable relationship to a permissible state objective. Title VII should not destroy a statute's presumption of validity, nor should a state be called into question only upon the showing of a disparate statistical effect from a given statute.

The appellants contend Title VII and the fourteenth amendment should not require two separate standards for reviewing a state statute. The proper standard in any case is that traditionally applied under the fourteenth amendment from whence came Title VII's power of application to the states. Judged under this standard, the Alabama statute is clearly valid. The neutral statute and the proof adduced below show no contest of the legislature's lawful intent. However, even if shown to be prima facie discriminatory under the traditional fourteenth amendment requirements, the physical nature of a law enforcement job and its necessary service show a reasonable relationship with an employment requirement for minimum height and weight.

The challenged regulation should likewise be measured by the traditional equal protection analysis. It is facially neutral in prohibiting *either* sex from contact positions in a penitentiary for the opposite sex. The regulation at most causes only a disproportionate effect on women guards due to fewer female prisoners presently in the system. Such a fact shows no pretext for invidious discrimination. However, even assuming that this effect was sufficient to show the regulation to be prima facie discriminatory, ample justification is found in the Board's legitimate concerns for its promulgation and validity.

The appellants further contend that the above arguments notwithstanding, the challenged Alabama statute is valid even under normal Title VII standards. The proof of plaintiffs below showed only a statistical disparity between males and females on a statewide basis from the minimum height and weight requirements. No proof of either past-overt discrimination was presented, nor was any inference of discriminatory intent produced. Therefore, discrimination itself was not established. This failing prevented a prima facie case from being established. Furthermore, a plaintiff under Title VII when challenging a state statute should have an increased burden due to the presumed validity of a statute as well as the public availability of any information necessary for a challenge. In addition to these facts, the Alabama height and weight minimums, although not scientifically validated, are supported by the unique and unpredictably varied duties of a law enforcement officer. To insure that these standards were closely tied to job relatedness, the statute provides for waiver of these requirements in cases where they would exclude an otherwise capable employee.

Regulation 204, like the Alabama statute, is also fully supportable on Title VII grounds. Due to its facial neutrality, it is not explicitedly discriminatory. It admittedly has some disproportionate effect; however, this is not sufficient to bring the regulation into question. Although the court below assumed the regulation to be prima facie discriminatory, no past history of sexual discrimination was attributed to the Board nor were they found to have intended any gender-based effects. Therefore the plaintiffs challenge to the regulation was insufficient to shift the burden to the defendant for its justification. As in the case of the challenged statute, the plaintiff's case should have a greater minimum showing requirement due to the regulation's state origin.

Nevertheless, even ignoring the failings of plaintiff's challenge, the regulation should still stand. The factual consideration before the Board of Corrections in attempting to administer the needs of its inmates, the state populus and its employers show adequate justifications for the minimal infringement upon plaintiff's sexual freedom wrought by Regulation 204.

Appellants therefore urge that the opinion below be reversed, and that the validity of both the challenged Alabama statute and administrative regulation be upheld.

ARGUMENT

I. THE INCLUSION OF ALL STATE ACTIVITIES WITHIN THE COVERAGE OF TITLE VII IS AN UNCONSTITUTIONAL EXTENSION OF CONGRESSIONAL AUTHORITY.

A. Congressional Authority For The Enactment of Title VII Arises From Article I, Section 8, Clause 3 (The Commerce Clause) and Section 5 of the Fourteenth Amendment.

The appellants contend that the inclusion of all state activities within the coverage of Title VII is an unconstitutional extension of power of the congress. In its original form, Title VII had no direct application to states. Its original provisions specifically excluded a state from the definition of employer. In similar fashion, the term "industry affecting commerce" did not include governmental activities. *See* Pub L. 92-261, 1972 U.S. Code Cong. and Adm. News 2137. However, in 1972, the act was amended. Pub. L. 92-261, 86 Stat. 103 (Mar. 24, 1972). The 1972 amendment removed the specific exclusion of states from the term "employer"

as well as redefining the term "industry affecting commerce" to include "*any* governmental industry, business or activity." (Emphasis added). Section 701 (h), 42 U.S.C., §2000e(h). The appellants in the case at bar contend that such amendments were beyond the authority granted to congress under any provisions of the United States Constitution.

Under the commerce clause the congress has plenary power to regulate the various aspects of interstate commerce. *Maryland v. Wirtz*, 392 U.S. 193 (1968); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *United States v. Darby*, 312 U.S. 100 (1941); *Gibons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). By virtue of this power, congress can prohibit by statute various forms of discrimination in private employment which it deems will adversely affect the flow of interstate commerce. *Katzenbach v. McClung*, 379 U.S. 294 (1964). No doubt this authority supports many of the provisions of Title VII. Equally well settled is the fact that a state as an entity may be regulated under this clause by valid federal legislation. *See Maryland v. Wirtz*, 392 U.S. 193 (1968). However, the breadth of a regulation of "any [state] industry, business or activity" extends beyond the authority granted under the commerce clause. No doubt many state activities do affect interstate commerce and therefore may be congressionally regulated under this clause, but this authority extends *only* to these activities. The 1972 inclusion of any governmental activities in Title VII's coverage goes beyond the regulation of commerce by encompassing all government activities whether or not they may affect commerce. From the very wording of the statute, governmental activities are included regardless of their affect on commerce:

> "(h) The term 'industry affecting commerce' means any activity, business, or industry in commerce or in

which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry' affecting commerce 'within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity*'." (Emphasis added) 42 U.S.C. §2000e(h)

This expanded coverage under the 1972 amendments may not therefore be supported by the commerce clause powers.

While congressional regulation of private employers needs the support of the commerce clause, congress is granted other independent power for regulation of states by virtue of the fourteenth amendment. *See United States v. City of Milwaukee* 395 F. Supp. 725 (E. Wis. 1975). Under section five of the fourteenth amendment, congress is given specific authority for the enforcement of that amendment by "appropriate legislation."

A study of the congressional history of the 1972 amendments indicates that it was the fourteenth amendments enabling powers upon which congress intended to base its expansion of Title VII and not the commerce clause. The chairman of the Senate Committee on Labor and Public Welfare, Senator Harrison A. Williams, Jr., praising the motive of the 1972 amendments stated:

> "Through use of the enabling clause of the 14th Amendment, the promise of equal protection can become a reality. The last sentence of the 14th Amendment enables Congress to enforce the amendment's guarantees by appropriate legislation.
>
> The inclusion of state and local government employees within the jurisdiction of Title VII protections will fulfill the congressional duty to enact the 'appropriate legislation: to insure that all citizens are treated equally in this country'." 118 Cong. Rec., §789.

This statement tends to support the proposition that the only congressional authority for including a state under Title VII is derived from the fourteenth amendment.

B. The Mandate Of Equal Protection To The States Under The Fourteenth Amendment Is Not Met By Federal Legislation Which, Although Valid Under The Commerce Powers, Establishes Special Protection For Established Classes In Areas Not Affecting Commerce.

The enabling powers of the congress to enforce the provisions of the fourteenth amendment extend only to the limits of that amendment. Of particular importance here is the equal protection clause of that amendment. It is axiomatic that "appropriate" legislation for enforcement of equal protection must in fact provide equal protection. Title VII when judged by this simple principle falls considerably short. The standard applicable to state action under the equal protection clause is distinct from the power of congress to establish different standards for conduct affecting interstate commerce.

As is evident from the considerable congressional debate and discussion of the act during its passage, the laudable goal of Title VII was unquestionably that of "equal" employment. The means to achieve this goal was to grant special protection to those persons discriminated against on the basis of race, color, religion, sex, or national origin. These categories were given special protection due to past discrimination in those areas. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430(1971). It was intended that by giving priority

under the act to these areas of discrimination, any remaining vestiges of past discrimination in employment could thereby be removed. *See Alexander v. Gardner - Denver Co.*, 415 U.S. 36 (1974); *Bowe v. Colgate Palmolive Co.*, 489 F. 2d 876 (7th Cir., 1973). No doubt there is ample moral justification for this goal. And, if such designated areas of discrimination were involved in interstate commerce a legal basis for their special treatment can be found in the commerce clause. However, to attempt such special treatment in areas other than interstate commerce under the auspices of enforcing equal protection poses an anomaly of the most blatant nature.

Equal protection from unlawful discrimination is not achieved by preferential treatment to claims in certain areas only. Furthermore, legislation which mandates such treatment is certainly not "appropriate" legislation to enforce equal protection.

Title VII gives substantial preferential protection to claimants alleging discrimination in one of the five protected areas. Such claimants have available to them the entire enforcement machinery of the Equal Employment Opportunity Commission. Furthermore, their burden to show a prima facie case has been substantially lessened from that of discriminatory claims not arising under Title VII. *Griggs v. Duke Power Co., supra.* In addition to these factors, a state defendant under a Title VII claim has a substantially higher burden to overcome once a prima facie case has been established than would be the case if the claim had not been given special treatment under the act. For example, a state defendant in a Title VII action must show, once the burden of proof has shifted, a business necessity or bona fide occupational qualification for his employment practice. *Weeks*

v. Southern Bell Telephone & Telegraph Co., 408 F. 2d 228 (5th Cir., 1969). The paucity of successful defenses once a prima facie case has been shown under Title VII, indicates the severity of this burden. This is a substantial benefit to Title VII claimants. If a discriminatory claim is asserted against a state defendant on grounds not covered by Title VII, the plaintiff must affirmative show intentional discrimination on the part of the defendant. If this can be shown, traditional equal protection analysis requires the state defendant to generally show only a reasonable relationship between the challenged policy and a legitimate public purpose. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Obviously, claimants asserting discrimination in areas not covered by Title VII have significantly less protection than Title VII plaintiffs. Such disparity of treatment cannot be tolerated under the equal protection clause. Equal opportunity for employment prohibits *all* forms of state sponsored discrimination on an equal basis. Likewise, an act furthering this goal can provide redress for such discrimination only on an equal basis for all claimants—regardless of the grounds for their discrimination. Therefore, the congressional limitation of Title VII to discrimination on the basis of race, color, religion, sex and national origin, is, in itself, an abridgement of the equal protection rights of plaintiffs who maintain discriminatory claims on other bases and who are not provided protection under Title VII. It cannot therefore be maintained that Title VII's extension to state employers is an enforcement provision of the fourteenth amendment.

C. Title VII's Prohibitions On The Use Of Certain Criteria For Employment Find No Justification In Affirmative Action Theories Which Attempt To Equalize The Opportunities For A Specific Race Or Sex.

The appellants recognize that forms of racial preference have been allowed in the past and even mandated in some instances. *See e.g. Swann v. Charlotte - Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir., 1968); *Offermann v. Nitkowski*, 248 F. Supp. 129 (W.D.N.Y., 1965) *aff'd* 378 F. 2d 22 (2d Cir., 1967). In these cases, as well as in *Green v. County School Board*, 391 U.S. 430(1968), which first mandated affirmative action, racial consciousness was used in an attempt to negate the effects of social and cultural deprivation of minorities. In similar fashion, Title VII attempts to equalize employment opportunities by removing past stigmas of discrimination in certain areas. It might therefore be argued that the preferential protection under Ttile VII, like affirmative action plans, promote, rather than deny equal protection. Of singular importance in assessing such an argument is the origin from which the preferential treatment came.

When a court in a case such as *Green, supra,* orders affirmative action or some form of color consciousness it does so, in light of specific facts before it. From these facts, the court can determine whether or not the plaintiffs actually suffer from past social deprivation and to what degree, thereby allowing the court to fashion relief to promote truly equal opportunity. However, when congress in Title VII undertook to give special protection in certain cases of discrimination, the parameters of its affect were not defined by a single set of facts. The preferential protection offered by the statute finds little or no justification in prior inequities due to the statutes breadth. Very likely a plaintiff under Title VII could be a white, male protestant with no history of cultural deprivation but who was denied employment on the basis of one of the forbidden criteria — race, color, religion, sex,

or national origin. Such blanket coverage through the inflexibility of a statute bears little analogy to a judicial decision fashioning relief for a plaintiff of a given sex or race whose race or sex is shown to be socially deprived. In short, Title VII prohibits the discriminatory use of certain criteria for employment regardless of the choice made from such use, whereas affirmative action plans seek to equalize the opportunities for persons of a specific sex or race. It is therefore the contention of the appellants that Title VII's application to the states is an unconstitutional exercise of congressional power finding no justification in the affirmative action theories of equal protection analysis.

II. TITLE VII PERPETRATES AN IMPERMISSABLE INFRINGEMENT OF INDIVIDUAL RIGHTS UNDER THE NINTH AMENDMENT, AS WELL AS INFRINGING UPON STATE'S RIGHTS UNDER THE TENTH AMENDMENT.

A. The Ninth Amendment Is Violated by Title VII's Infringement Upon Fundamental Rights Of The People.

The appellants in the case at bar contend that in addition to Title VII's failings under the equal protection clause, it also denies fundamental individual rights under the ninth amendment. Appellants are state officials, yet the unconstitutional infringement on individual rights by Title VII has as great an impact upon them as it does any individual employer. They are certainly affected sufficiently to allow a sharpening of the issue as is required for their standing to assert this ground. *Flast v. Cohen*, 392 U.S. 83 (1968). The reasons proposed showing a ninth amendment violation, show equal impact on individual employers as well as state employers.

Under Title VII and its application, an employer is greatly restricted not only in his right to freely contract with new employees, but also in the freedom of his actions in the running of his business. Admittedly, such restraints pose to the courts a balancing problem between the rights of an individual and any incremental good to society. It is the contention of the appellants, that Title VII taxes the rights of the individual employer far too much for the actual benefit it produces.

In a society such as ours, which operates under a free economic system, it is of paramount importance that the individual rights of our employers be recognized and protected. No doubt some regulation of free interprise is necessary to prohibit societal exploitation. Obvious examples of such necessary regulations include the Taft-Hartley Act, the Child Labor Laws, Workman's Compensation Laws and even the Occupational Safety Act which established OSHA. All of these laws impose some restriction on employer's rights, yet they are all justified by the countervailing considerations of public welfare. Also common among all of these acts is the fact that they seek to check over-zealous profit seeking which harms the public. They do not however, call into question the position of the employer as being the best judge of business efficiency as does Title VII.

In effect, Title VII puts an employer in the position of having to defend nearly every employment policy he may establish before the critical eye of a plaintiff (applicant/-employee) and a federal commission or judge who, in most cases, possess only a minute comparative knowledge about the business in question. Very little attention has been given the fact that an employer's motive in the first instance is that of *profit*. It naturally follows that if his employment

policies were not sufficiently business related to allow the choice of competent employers then the business will fail. Social prejudice in a business realm which excluded available competent employees from consideration would be an expensive, if not disasterous flaw in any business. Nevertheless, Title VII by its terms and application assumes that all employment policies which have a disproportionate affect in any of the five areas under Title VII protection are the result of just such a motive. See NOTE, 72 Colum. L. Rev. 900 (1972).

The liberal application of this Act has encompassed virtually all employee related decisions, by an employer. For example, in the case at bar, a completely sex-blind statute was called into question by merely showing that more men than women in Alabama could meet its physical minimums. While the appellants contend that this was also a misapplication of the relevant law, such harassment of employers is common place under Title VII. *See e.g., Fowler v. Schwarzwalder*, 351 F. Supp. 721 (D. Minn., 1972); *Parham v. Southwestern Bell Telephone*, 433 F. 2d 421 (8th Cir., 1970); *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir., 1971); *Buckner v. Goodyear Tire and Rubber Company*, 339 F. Supp. 1108 (N. Ala. 1972).

Under Title VII's present interpretation nearly every employment test of nearly every employer regardless how neutrally phrased must be defended when challenged by only a statistical showing of a disproportionate impact. If a strength test or height/weight requirement is used by an employer seeking employees for some physically-related job, this will almost invariably have a disproportionate impact on women due to their inherently smaller structure. See NOTE, 47 So. Cal. L. Rev. 585 (1974). *Also see Officers For Jus-*

tice v. Civil Service Commission of San Francisco, 395 F. Supp. 378 (N. Cal., 1975); *Meadows v. Ford Motor Co.*, 62 F.R.D. 98 (W.Ky., 1973), *mod. on other grounds*, 510 F. 2d 939. Likewise, if an employer is engaged in a more intellectually oriented field and requires some form of written tests or minimum educational standards this will nearly always affect blacks in a disproportionate fashion due to their previous social deprivations. *See e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Therefore, in nearly all instances of employment testing the employer will be presumed to be discriminatory until he can prove otherwise.

An additional impediment to an individual's liberty in the operation of his business is the fact that when challenged, he is required to affirmatively show the relationship of his employment policies with the efficiency and safety of his business. Validation of these tests is a matter of requirement by the EEOC. 29 CFR, §1607, 35 F.Reg. 12333 (Aug. 1, 1970).

Regardless of the social desirability of prohibiting certain kinds of discrimination above other forms of discrimination, to subject the American employer to the unjustified harassment prevalent under Title VII is not warranted. The business employer should not be held accountable as a vessel of social change. It is completely unrealistic to assume that the tapestry of skills, abilities and talents in our country cut equal paths among all races, colors, religions, sexes and national origins. To hold an employer accountable for the disparities among these classes in particular fields is a serious contravention of his individual freedoms. Title VII's present interpretation by many courts place just such a burden on employers. Surely the ninth amendment rights reserved to the people, encompass the rights of an employer to pursue

profit by the reasoned choice of competent employees without the burden of having to justify every decision when they are questioned by little more than the bare allegations of a disappointed employee or applicant. Appellants ask this Court to so find and to strike down those areas of Title VII which might tend to support a contrary interpretation.

B. Assuming Arguendo That Title VII Has Valid Application To The States, Then Its Present Mode Of Application Is Violative Of The Tenth Amendment Police Powers.

As the appellants argued earlier, congress assumed its power to enact Title VII and its amendments from the commerce clause and the enabling clause of the fourteenth amendment. (See Argument I). We make no argument here that the legitimate use of Article I, §8, cl. 3 by the congress in Title VII contravenes the tenth amendment. We recognize that the tenth amendment and the commerce clause are mutually exclusive. *See United States v. Bally Mfg. Corp.*, 345 F. Supp. 410 (D.La., 1972). We do contend, however, that Title VII's application to the state's, which is justified only by the fourteenth amendment, is violative of the state's police power in addition to the doctrine of equal protection as was argued earlier (See Argument I (c)). The appellants do not challenge the act on the preemption doctrine, but rather on the basis that Title VII and its application upsets the balance between the preservation of fourteenth amendment rights and those of the states. In short, it is the position of appellants that Title VII has application to the states only by virtue of the fourteenth amendment; therefore, the previous caselaw balancing the equities between the fourteenth and tenth amendments should have application. *E.g. McGowan v. Maryland*, 366 U.S. 420 (1961); *Loving v. Virginia*, 388 U.S. 1 (1967), *McLaughlin v. Florida*, 379 U.S.

184 (1964). However, in Title VII litigation, the state defendant is treated with no more deference than an individual. No greater degree of proof is required by Title VII to show a state statute is discriminatory than with any other defendant; nor are a state-defendant's available defenses any less burdensome. Such indiscriminant treatment of states violates the tenth amendment, as well as the holdings of a multitude of cases of this Court decided under the fourteenth amendment. This Court stated the relationship of the fourteenth and tenth amendments succintly in *McGowan v. Maryland*, 366 U.S. 420 at 425-426 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (citations omitted).

It is this reasonable relationship standard which should be applied when a state statute is challenged under the purview of the fourteenth amendment. Appellants contend that Title VII's blanket application to the states by its own terms is violative of the fourteenth amendment (See Argument I(c)); however, even if it were held valid in that respect, a state statute is entitled to more respect than is given by the act's provisions and application. The substance of this

argument is that, if Title VII is valid in the source of its enactment power, any application to a state defendant will still require the traditional presumption of validity in relation to state statutes. Furthermore, the only burden such a defendant need overcome is to show a rational relationship to a permissible state objective. State application of Title VII derives from the fourteenth amendment and must therefore bow to previous limits of that amendment's restraint on states rights.

In the case at bar, the appellants were called upon to defend both a state statute and a regulation after the mere showing of a statistical disparate affect upon female and males in general from a height and weight requirement. Even though this statute was the result of the collective wisdom of the entire Alabama legislature, it was called into question with no more proof than that required to challenge the caprice in employment of an individual proprietor. No presumption of validity was indulged for the enactments, nor was the plaintiff required to shoulder the burden of proof normally required when challenging a statute. Furthermore, the state statute was judged on the basis of the "business necessity test", with the administrative regulation measured against a bona fide occupational qualification standard. No acknowledgement was made of the state legislature's province. No inquiry was made as to whether the state's provisions were reasonably related to a permissible state objective. The appellants contend that such derrogation of the state's rights is violative of the tenth amendment. Furthermore, appellants contend that even if this Court should find Title VII valid in its application to the states, a correct application of the reasonable relationship standard to the statute and regulation in question will uphold their validity.

III. TRADITIONAL EQUAL PROTECTION ANALYSIS UPHOLDS THE VALIDITY OF BOTH TITLE 55, § 373 (109), CODE OF ALABAMA (1940) (RECOMP. 1958) AND THE BOARD OF CORRECTIONS ADMINISTRATIVE REGULATION NUMBER 204.

In the first instance, the facts before the court below would not have justified a prima facie case for the plantiffs when judged on traditional equal protection standards. Even the opinion below recognized that the standard of proof for a challenge under the equal protection clause is higher for a plaintiff than under Title VII. See Jurisdictional Statement at 32). This Court's recent decision in *Washington v. Davis*, 96 S.Ct. 2040(1976), firmly establishes this fact by holding that invidious discrimination under the fourteenth amendment requires discriminatory intent and not merely a disproportionate impact. Of course, such an impact is relevant to the question of intent. However, in the case at bar, even assuming there was some disproportionate impact on men and women from the height/weight requirement of the state statute or from the administrative regulation, the other facts before the Court deny any intent on the part of the Alabama legislature or the Board of Corrections to invidiously discriminate against women.

A. Title 55, § 373(109), Code of Alabama (1940) (recomp. 1958) Establishes Classifications Reasonably Related To Permissible State Objectives.

The state enacted a statute setting minimum standards for law enforcement officers. Title 55, § 373(109), Code of Alabama (1940) (Recomp. 1958). No mention of sex was made in the statute; however, height and weight minimums were established. These minimums required a law enforcement officer, male or female, to be at least five feet two inches tall and to weigh at least one hundred twenty pounds. Included within the coverage of this act are prison guards hired by the defendant Alabama Board of Corrections.

Plaintiffs below produced statewide statistics encompassing females between the ages 18 and 79 and interpreted them to show that more women than men would be excluded from these jobs due to the smaller stature of women. In addition to these general facts, plaintiffs adduced little if any evidence which had bearing on the intent of the Alabama legislature in establishing the standards. The plaintiff offered testimony of two expert witnesses in an attempt to show that these minimums had no job related characteristics. As both witnesses, Mr. Nelson and Mr. Sarver, agreed however, a prison environment necessitates the frequent use of force by guards to subdue unruly inmates. Naturally, both witnesses noted that guards are a minority in a prison and could not be expected to overcome an entire prison population single handedly. In such an environment of unpredictable violence it was proposed that probably the most desirable characteristic for a guard would be a coolness of nerve. Nevertheless, the physical nature of the job prompted even Mr. Nelson to agree that if his employment decision for a guard was between two men of different sizes but with all other qualifications equal, he would choose the larger of the men (A. 212). Of additional import here is the fact that both Mr. Sarver and Mr. Nelson drew on experiences from supervising prisons disimilar to those in Alabama. (A. 195-96) Also, neither man had any indepth knowledge of the problems in the Alabama system, although Mr. Sarver had visited several of the Alabama institutions (A. 203-05). These facts hardly show that the height and weight minimum are "mere pretexts designed to effect an invidious discrimi...tion against the members of

one sex or the other." *Gedulid v. Aiello*, 417 U.S. 484, 496-497, n.20 (1974).

Furthermore, even if the state should be required to justify its statute, the facts in the record more than show a reasonable relationship between the height/weight minimums and a lawful state objective. In reviewing any state justification for the statute, the appellants contend that the Court should not be bound by the testimony of a single defendant. The court below apparently assumed that the entire burden of justifying the act was upon the shoulders of Commissioner Locke. (See Jurisdictional Statement at 40) Certainly the reasons he saw as justifying the statute are valid, however his voice should not be taken as that of the entire state legislature. Yet the court below apparently limited its considerations to only the reasons proposed by Locke. A state statute should not stand or fall upon the opinion of one man.

Unquestionably, the state has a valid interest in providing adequate law enforcement for its populus. By enacting minimum standards for law enforcement officers, the state was seeking to achieve that end. Considering the unique nature of law enforcement and the variety of functions which any given officer may have to perform on a moment's notice, it is not unrealistic for the legislature to presume that size, in and of itself, would in many instances be beneficial. This relationship to the job in general is admittedly not mathematically definable, but neither could the job required of law enforcement officers be precisely described to encompass every potential situation. Certainly, state legislators, familiar with the problems of law enforcement in their particular state, should not be held to so rigid a standard with such an essential service. The potentials of strength, leverage, pys-

chological advantage, and matters even more subjective, should be seen as adequate justification for the state act under attack and more properly weighed in a legislative forum. The court below even recognized that the height/weight minimums have some relationship to strength, albeit "crude". (See Jurisdictional Statement at 41).

The appellants here contend that this "crude" relationship, as well as other resultants of a minimum height and weight requirement, show an adequate and rational relationship to the provision of capable law enforcement officers. The widespread use of such minimums among law enforcement agencies also attest to their validity as reasonable requirements. A survey of various agencies indicates that the F.B.I. maintains a height minimum as do 47 of the nation's 50 largest urban police departments. *See*, Note, 47 So. Cal. L. Rev. 585, 586 (1974).

Appellants therefore urge that the court below erred in striking down the Alabama statute as it is rationally related to a legitimate state objective.

B. Administrative Regulation 204 Of The Alabama Board Of Corrections Is Rationally Related To A Permissible State Objective.

1. Regulation 204 should be measured by the rational relationship test.

Administrative Regulation 204, which was also striken down by the lower court's ruling, was promulgated by the Alabama Board of Corrections. The regulation was an attempt by the Board to identify certain jobs in both the male and female prison institutions where the use of guards of the opposite sex would be disadvantageous. The criteria

of the regulation and their application had equal application to both men and women guards, in that each sex was restricted in some jobs in prisons for the opposite sex. There are more male prisons in Alabama and this, of course, increases the actual number of available guard positions for males under Regulation 204. However, the regulation itself applies to both males and females equally. No distinction is made between treatment of females as opposed to that of males under Regulation 204. For that reason, appellants contend that the terms of the regulation show no gender-based discrimination. The Court therefore need not be concerned with any argument for the application of "strict scrutiny" to the regulation. *See Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). If the terms of the regulation levied special impediments on women then those arguments might be applicable, but as is evident from the regulation both men and women are limited in employment opportunities. The reasons proposed for strict scrutiny of a particular classification are usually based upon some prior social deprivation of that particular class. However, since Regulation 204 effects both men and women alike, social deprivation would not justify strict scrutiny of the entire statute because men are generally not considered socially deprived. Although the sex of the applicant guard, whether male or female, is a factor under Regulation 204, it is not the sole determinant of employment opportunities. This factor must be considered in conjunction with the sex of the prisoners to be guarded, as well as other factors before a job assignment is made. It is the combination of these factors which determines a job assignment for any guard, male or female. Regulation 204 certainly does not define opportunity in a discriminatory fashion toward women. Whatever the merits of the argument that this Court should now adopt the strict scrutiny test for sexual classifications

are therefore inapposite to Regulation 204.

2. The plaintiffs failed to show that Regulation 204 was a pretext for invidious discrimination.

Regulation 204 was carefully drafted by the Board of Corrections only after the solicited advice of counsel for the EEOC in order to assure protection of the rights of all parties involved. (See Jurisdictional Statement at 57-63). The Regulation itself is facially neutral by affecting both men and women with no distinction. As mentioned above, however, there are more male prisons than female in Alabama. Therefore, the application of the Regulation has a disproportionate impact on women because there are fewer contact positions for women than for men in the Alabama system. This fact without more does not show a prima facie case under the fourteenth amendment. *See Washington v. Davis*, 96 S.Ct. 2040 (1976). As the facts in the record indicate, women are used in the male prisons and men are used in the female prisons, but neither men nor women are used in contact positions with penitentiary prisoners of the opposite sex. This policy of the Board affects both men and women guards rather than just limiting women as the court below stated. (See Jurisdictional Statement at 25). Even though women guards have fewer contact positions available to them under the Regulation because of the smaller number of female prisoners, this fact hardly shows the Regulation to be invidiously discriminatory.

3. If the facts before the Court show a prima facie case against Regulation 204 under the fourteenth amendment, the action must fail as the Regulation is supported by a legitimate state interest.

Appellants admit that it is the policy of the Board of Corrections that guards of either sex should not be used in

contact positions within penitentiaries housing prisoners of the opposite sex. This policy is soundly supported by the experience of the prison authorities, and is justified by state objectives of maintaining safety, control, and security of the prisons, both within and without their walls. The appellants further contend that those state goals are compelling, should this Court choose to apply strict scrutiny, and that Regulation 204 is both necessary to those objectives, and the least offensive method of achieving them. *See Loving v. Virginia*, 388 U.S. 1, 10-11 (1967); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The facts before the Court support these contentions.

The testimony of Commissioner Judson Locke in the record gives the Court the most detailed insight into the problems and considerations of the Alabama penal system (A. 111-13). As Commissioner Locke stated, the penitentiaries in Alabama are dormitory-type institutions with communal toilets and showers. (A. 101). Furthermore, large scale farming operations are conducted at several of the institutions which require daily strip searches of large numbers of inmates. (A. 103-106). All of the penitentiaries are designed as maximum institutions. Additionally, approximately 20% of the inmate population is composed of sex offenders (A. 149). Violence is a daily occurrence in the Alabama system and requires physical combat between guard and inmate on a regular basis. (A. 121-23). Also noteworthy is the fact that guards in each institution are used interchangably in the various jobs and patrols. (A. 100-01). This is done due to manpower limitations, as well as to assure that all guards are acquainted with all aspects of the institution so as to provide for maximum flexibility in the event of control problems in any area of the prison. These facts all weigh heavily to justify the Board's decision not to interject an additional

disruptive factor of possible sexual attraction between guards and inmates into the prison system.

Further justification for the Board's reticence to use guards with inmates of the opposite sex in contact positions within penitentiaries, is found in the Board's experience with such arrangements in minimum security institutions. As Commissioner Locke testified, in some work release centers and at a youth facility some guards are used in contact positions with inmates of the opposite sex. (A. 109-10). Even though these centers house the "cream" of the inmate crop, are minimum security, provide a more normalized environment, and inherently require less infringement upon each inmate's rights of privacy, several difficulties have arisen. (A. 112). These problems have all had sexual connotations including: open flirting between guards and inmates, physical advances, loss of control attributable to perceived weaknesses of a female supervisor over male inmates, increased responsibility on other guards to quell any problems arising because of sexual attraction. (A. 305). While women are still used in these male institutions, the disruptive factors experienced in these tranquil waters suggest even greater problems would be encountered in a penitentiary setting. No doubt these same reasons were noted by the Federal prison administration in its choice not to use guards of the opposite sex in contact positions within penitentiaries until sufficient safeguards can be afforded (A. 214-15).

In light of these facts and the crucial nature of prison management, both to the surrounding community and the inmate population, the Board's regulation restricting contact guard positions to guards of like sex with that of the inmates is compelling and reasonable. In an atmosphere possessing no heterosexual outlets, a recognition of the excitement caused by the introduction in close contact of persons of the opposite

sex can hardly be seen as unreasonable. Regulation 204 seeks to avoid these problems by restricting *only* those contact positions. Appellants contend such a restriction is both reasonable and patently justified.

IV. ASSUMING ARGUENDO THAT TITLE VII IS CONSTITUTIONALLY VALID IN ITS APPLICATION TO THE STATES, TITLE 55, 373 (109), CODE OF ALABAMA (1940) (Recomp. 1958) IS VALID UNDER TITLE VII AS IT HAS NOT BEEN SHOWN TO BE PRIMA FACIE DISCRIMINATORY AND IT IS FURTHER SUPPORTED BY A VALID BUSINESS NECESSITY.

A. The Evidence Presented By The Plaintiffs Fails To Demonstrate Gender-Based Discrimination.

1. A statistical disparity is insufficient by itself to show invidious discrimination.

Assuming for argument sake that Title VII is properly applicable to the states, appellants contend that the evidence below failed to show a prima facie challenge to the Alabama statute. As this Court recently held in *General Electric Co. v. Gilbert*, 45 U.S.L.W. 4031 (Dec. 7, 1976), there are some differences in discrimination challenges under Title VII as opposed to the fourteenth amendment, however, the case law under the fourteenth amendment is useful in a Title VII case as a starting point of interpretation. 45 U.S.L.W. at 4033. The Court pointed out a particular similarity between the two types of actions is that both require a finding of "discrimination". This term, as the Court noted, is not defined in Title VII and must therefore draw its definition from prior case law. Consequently, under either a Title VII claim or a fourteenth amendment claim, discrimination itself must be

shown. When a challenged action is based on gender per se as in *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 677 (1973), this showing is simplified However, when a neutrally based classification is challenged, the plaintiff must show that the distinctions made are "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484, 496-497, n. 20 (1974). This finding of sex-based discrimination is necessary to "trigger" a finding of an unlawful employment practice under Title VII. *General Electric Co. v. Gilbert*, 45 U.S.L.W. 4031, 4034 (Dec. 7, 1976).

As the Court noted in *Gilbert*, "a prima facie violation of Title VII can be established *in some circumstances* upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another." (Emphasis added) 45 U.S.L.W. at 4034. *Also see, Washington v. Davis*, 96 S.Ct. 2040, 2051 (1976). This statement by the Court was followed by a reference to *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) wherein a prima facie case was established of invidious racial discrimination, even absent proof of intent, through the showing of disproportionate racial effect from employment tests. The appellants contend that it is especially crucial to note that the facts before the Court in Griggs unquestionably showed a past practice of overt racial discrimination in the company's employment policies. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) wherein a prima facie case was established of invidious racial discrimination, even absent proof of intent, through the showing of a disproportionate racial effect from employment tests. The appellants contend that it is especially crucial to note that the facts before the Court in *Griggs* unquestionably showed a past practice of overt racial discrimination in the company's employment poli-

cies. *Griggs v. Duke Power Co.*, 401 U.S. at 427-428. This fact, in conjunction with a racially disproportionate impact from present employment tests moved the Court to find that a prima facie case of invidious racial discrimination in violation of Title VII had been shown. Appellants content that these are the "circumstances" which this Court in *Gilbert* stated would show a prima facie case of discrimination in a neutral plan. The logic of this position is further supported by the legislative intent of Title VII to free certain classes of individuals from the "barriers that have operated in the past to favor an identifiable group" over other employees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). *Also see, Bowe v. Colgate Palmolive Co.*, 487 F. 2d 896, 900 (7th Cir., 1973); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Garrett v. Mobile Oil Corp.*, 395 F. Supp. 117, 124 (W. Mo., 1975); *Officers For Justice v. Civil Service Commission of San Francisco*, 395 F. Supp. 387 (N.Cal. 1975).

From the holdings of the above-cited decisions, appellants deduce that a prima facie case of sexual discrimination under Title VII requires (1) a disproportionate effect on applicants of different sexes caused by the challenged classification, *and* (2) a past history of overt sexual discrimination by the defendant. Applying these factors to the case at bar, it is evident that the plaintiff failed to prove a prima facie case of sexual discrimination form the Alabama statute. A cursory examination of the opinion of the court below quickly reveals that its finding of a prima facie case under Title VII was based *solely* upon a statistical survey of the entire female population of Alabama. That survey purportedly shows a disproportionate impact on women from the height and weight minimums of 5'2" and 120 lbs. (See Jurisdictional Statement at 32, 35). Such a general statistical showing should not in and of itself shift the burden of proof to the defendants. The plaintiffs produced no evidence of any intent to discriminate, nor of any past history of sexual discrimination. While appellants recognize that "intent" to discriminate is not necessary under Title VII, it is our position that if no intent is shown, then plaintiff's must at least show some previous history of discrimination to that class by defendants before the burden should shift. Statewide statistics indicate very little standing alone. Certainly they do not approach a showing of invidious discrimination to actual applicants from a facially neutral statute. As this Court noted in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), an employer should only be burdened with defending his employment practices after discrimination has in fact been shown. The Court there stated:

> "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. *See McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)." 422 U.S. at 425.

The statistics offered in the case at bar make no pretense of representing "applicants". The ages covered (18-79) far exceed the age of employable prison guards. Furthermore, as the court below notes, only a small percentage of the females surveyed are even in the work force. (See Jurisdictional Statement at 31-32).

If this Court should hold that a statewide statistical disparity is necessary, then nearly every employment criteria or test would be prima facie discriminatory to at least one of the protected Title VII classes. It would stretch the imagina-

tion to develop an employment test which would be job related as well as having exactly equal effect on all sexes, colors races, religious and national origins within a given state. Surely more than a mere census finding should be required to place an employer on the defense. If not, then employer harassment by unfounded claims is certainly imminent as well as the commensurate burden upon the federal judiciary to determine in each case the percentage difference which be "disproportionate." Appellants contend that such was not the intent behind Title VII. We therefore urge the Court to find that the statistical showing of the plaintiff's below was insufficient to establish a prima facie case of sexual discrimination under Title VII.

2. When a state statute is challenged by a Title VII plaintiff, a presumption of validity should be indulged for the statute.

The appellants have found no cases where this Court has reviewed a Title VII challenge to a state statute. As we argued earlier, it is our position initially that state statuates not affecting interstate commerce can only be challenged under the fourteenth amendment and therefore, Title VII's blanket application to the states is impermissible. (See Argument I). However, even if this Court should uphold Title VII's application to the states, a presumption of validity should nevertheless be indulged for any state statute challenged. Such a presumption would impose a greater burden of proof upon the plaintiff to show not only a prima facie case of invidious discrimination as discussed above, but also to affirmatively show that the state statute is not a business necessity. Appellants urge that such an increase in the proof required of a plaintiff is justified, not only by the tenth amendment and the status of the states, but also by the fact

that state records, legislative histories, and other relevant data showing any business purpose behind a statute are generally matters of public record. Therefore, the usual problems of discovery would be lessened. Even though the 1972 amendments to Title VII included states within their coverage, it is inconceivable that congress meant to lower the judgment of a state legislature to a par level with that of any other employer who might be challenged under the act. Title VII and the fourteenth amendment can subject the same state statute to two separate tests of validity, and could, conceivably find different results. *See Washington v. Davis*, 96 S.Ct. 2040 (1976). Surely if this diminishment of tenth amendment rights is to be indulged, a state statute should at least enjoy the rebuttable presumption of validity traditionally afforded it. *See generally McGowan v. Maryland*, 366 U.S. 420 (1961).

B. Title 55, §373(109), Code of Alabama (1940) (Recomp. 1958), Even If Prima Facie Discriminatory, Is Supported By A Valid Business Necessity.

Appellants contend that even if the plaintiff had established a prima facie case, the defendants were entitled to a judgment when they established a business necessity for the minimum height and weight requirements. The law is clear that if an employer can show the business necessity of a job-related procedure, he may impose that requirement even though it has a tendency to place an additional burden on a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In the case presently before the Court, the defendants clearly established that the minimum physical requirments were directly related to successful job performance. An

abundance of testimony was taken which established the physical nature of the duties of prison guards and of other law enforcement officers under the statute. The safety and efficiency in job performance offered by minimum size requirements is evidenced by their widespread use in other agencies. *See Smith v. Troyan*, 520 F. 2d 492 (6th Cir., 1975). Most of the requirements used are more restrictive than the Alabama 5'2", 120-pound minimums. Moreover, the job requirements of a prison guard in the Alabama system are undoubtedly more rigerous than those of many law enforcement jobs. As the Commissioner of the Alabama Board of Corrections testified, at least forty assaults on guards by inmates have occurred within the past three years. The Commissioner further explained that he included only wound-producing assaults within his estimate. (A. 120). He also stated that within those same three years, two guards were killed by riotous inmates. (A. 119). Unquestionably, the prison atmosphere in Alabama is physically dangerous. Nearly every guard in any of the major institutions is physically exposed on a daily basis to a population composed of persons with repeatedly proven violent propensities. Daily violence between inmates is not unusual. The unpredictable requirements on each guard manifest themselves in the violent nature of the environment and its population. Moreover, nearly every aspect of the guard's function is physical in nature. Such an environment poses a very real premium in many cases upon brute force, height, weight, and agility. Experience with these factors were no doubt behind Commissioner Locke's statement that he personally would prefer an even larger person than required by the relatively low minimums of 5'2", 120 lbs. (A. 139). Particularly interesting as well, is the fact that plaintiff's expert witness, Mr. Raymond Nelson, agreed that the job was sufficiently physical to require some limitation on size. (A. 211).

Appellants recognize and admit that the statutory minimums of 5'2", 120 lbs. did not result from any scientific validation study that established it as a minimum size for law enforcement officers. *See generally, Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). A lack of previous validation should certainly have no effect on this Court's unprejudiced view of those tests. As we argued above, and incorporate here by reference, the promulgated judgment of a state legislature should receive more deference when challenged than should an individual. This argument has special import in areas as inherently subjective as the establishment of a job-related employment criteria. (See Argument IV(A)(2)) By this proposal, appellants do not seek to evade any burden of esatblishing job relatedness, but only to decrease any prejudice to the requirements due to a lack of independent, scientific validation.

It is apparent from the consensus of opinions in the record as well as token mention by the court below that: (1) the job of prison guards is physical in nature in many aspects; (2) that height and weight have at least a "crude" relationship to strength (See Jurisdictional Statement at 41), and (3) that the physical nature of the job requires some minimum limitation on size (A. 211). The only remaining question then becomes where to establish the minimum. Undoubtedly any cutoff point will appear arbitrary when it attempts justification against another point only fractions lower. However, the need for a standard and the relationship of *that* standard to the job provides justification. Certainly a state should not be required to prove as a mathematical certainty that a person, 5'2" and 120 lbs., can *always* perform the many tasks of a guard, whereas a person of any size the least bit smaller could not. To so limit a state, or any employer, would provide very little margin for error in judg-

ment regardless of the validation precautions taken. In a job as uniquely varied as is law enforcement the diminishment of any margin of error could prove disasterous, if not fatal, to either the employer/officer or to one who depended upon him. Certainly the state employer before this Court owes its employers and the state populus, both inside and outside the walls of prison, a duty to *insure* that its law enforcement officers are physically equipped to handle their jobs. Facts showing that only a small percentage of actual time is spent in physical combat etc., do not negate the crucial need for physical potential capable of coping with those instances.

Neverthless, to insure a proper balancing between the state's interest and prospective employees, a waiver provision was included in the statute to allow the employment of applicants not meeting the height or weight minimums. Title 55, §373(109)(d), Code of Alabama (1940) (Recomp. 1958). The court below recognized these provisions yet found them to be fundamentally unfair due to their "informal" and "subjective" procedures. (See Jurisdictional Statement at 42). Appellants urge that the lower court's finding in that regard was unfounded.

Mr. James Jackson, the director of the Alabama Peace Officers Standards and Training Commission, administers any waiver requests. As he testified below, waiver requests are submitted in writing by *either* the hiring agency or an individual. (A. 165). Formal forms are admittedly not used. He then personally reviews the request and issues a waiver if the person's height and weight are reasonably proportionate. (A. 166). Naturally, this procedure requires some subjective judgment on his part as would any waiver request, however, this necessary element should not invalidate the whole provision.

In addition to finding the provisions procedures invalid, the court below also found that the waiver provisions were discriminatorily applied to Ms. Rawlinson, the prospective prison guard. (See Jurisdictional Statement at 42). This holding was evidently grounded in the fact that the Board of Corrections had not informed Ms. Rawlinson of the waiver provision, nor requested the waiver for her. The court below evidently assumed that the state had the burden to exhaust Ms. Rawlinson's employment possibilities for her, and that failure to notify her of possible waiver provisions produced great prejudice to her. It is difficult to believe that Ms. Rawlinson was in any way affected by the inaction of the state in this regard. It would have certainly been much simpler for her to affirmatively find out the existence of this waiver possibility and to exhaust its provisions, rather than to file and perfect all of the steps involved in a Title VII action with the EEOC.

Regardless of Ms. Rawlinson's actual actions, the appellants contend that the waiver provisions in the Alabama statute and their application produce no fundamental unfairness. Furthermore, the provision of this waiver further evidence the intent of the Alabama legislature to insure that all qualified persons have equal opportunity for jobs as law enforcement officers. It embodies a recognition that *any* standard, even though generally justified, may exclude some individual of adequate capabilities. This provision therefore further molds the statute to "measure the person for the job". *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). In light of the unique nature of the job, a less offensive measure is not plausible.

V. ASSUMING THAT TITLE VII IS CONSTITUIONALLY VALID IN ITS APPLICATION TO THE STATES, THE

ALABAMA BOARD OF CORRECTIONS ADMINISTRATIVE REGULATION 204 IS NEVERTHELESS VALID.

A. Plaintiffs Failed To Present Any Facts Showing Regulation 204 Was Prima Facie Sexually Discriminatory.

The court below apparently assumed, without finding, that Regulation 204 is explicitely sexually discriminatory. No mention is made by the court of plaintiff's evidence in this regard, nor of any minimum showing being found. Regardless of the court's assumption, it is the contention of the appellants that Regulation 204 is facially neutral and that no prima facie showing of sexual discrimination was made. As was pointed out above, Regulation 204 applies equally to both sexes. (See Argument III (B) (1).) This is not a case of disimilar sexual treatment, nor a case where "sex-plus" another factor imposed a individious discrimination to one sex. *See e.g. Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). It is the manifested intent of the Board of Corrections that neither men nor women should work in contact positions within penitentiaries housing prisoners of the opposite sex. The only gender based effect of the Regulation lies in the fact that there are more male prisoners than female in Alabama which, under Regulation 204, limits the number of available guard positions for females more severely than for males. Therefore, a disproportionate impact is suffered by women guards from the effect of Regulation 204. Again, without reiterating a prior argument, appellants contend that a prima facie case of discrimination is not established by showing merely a disproportionate impact. (See Argument IV (A) (1).) Appellants therefore contend that plaintiffs below failed to present a prima facie challenge to Regulation 204, and further, that the court below erred in

placing the burden upon the defendants to show some business necessity for the regulation.

B. Even If A Prima Facie Case of Sexual Discrimination Was Presented Against Regulation 204, It Is Still Valid Due To An Underlying Business Necessity.

Regulation 204 as stated above is the administrative tool used to assure that guards of one sex are not placed in contact postiions within penitentiaries housing inmates of the opposite sex. Appellants propose that the Regulation results in no invidious sexual discrimination against women guards. In addition, appellants contend that any sexual connotations within the Regulation are fully justified by the facts before this Court. While Regulation 204 poses no explicit sexual discrimination, similar regulations in prison-like facilities, even when explicitly gender based, have been found justified on the basis of bona fide occupational qualifications. *See e.g., Long v. California State Personnel Bd.*, 41 Cal. App 3d 1000, 116 Cal. Rptr. 562 (1974); *City of Philadelphia v. Pennsylvaina Human Relations Commission*, 7 Pa. Cmwlth 500, 300 A. 2d 97 (1973). Appellants urge that the justifications before this Court, as well as the minimal amount of infringment upon the opportunities of female guards, far exceed the justification for the classifications in the cases cited above.

The regulation itself gives the wardens the responsibility of identifying each guard position which they find requires selective classification. These wardens naturally are the people most familiar with each job. The following criteria are used to establish that selection certification is necessary:

1. That the presence of the opposite sex would cause

disruption of the orderly running and security of the institution.

2. That the position would require contact with inmates of the opposite sex without the presence of others.

3. That the position would require patroling dormitories, restrooms, or showers while in use during the day or night.

4. That the position would require search of inmates of the opposite sex on a regular basis.

5. That the position would require that the correctional counselor or trainee not be armed with a firearm.

These criteria attempt to remove such a decision from the purely subjective judgment of any individual. Appellant contends that their considerations are practically based.

The uncontradicted evidence reveals that by far the largest amount of correctional officers in the Alabama penal system are employed at the four major all-male maximum security institutions. These maximum security facilities utilize dormitory housing rather than single-cell accommodations. The showers and toilets are communal and open to the hallway. The job of a correctional counselor there is primarily to provide security in the institutions. This requires that they must be capable of performing strip searches, shakedowns, and physically subduing inmates when necessary (A. 113). Moreover, twenty percent of the male prison population are sex offenders. These prisoners are not isolated, but remain scattered throughout the system. (A. 149). In addition to the high percentage of sex offenders within the prisons, other factors have also occurred which bring to light the special danger to a female within such an environment. For example, one week prior to Commissioner Locke's deposition an inmate attempted to ravish a female clerical employee. (A. 142). On another occasion a female college student was taken hostage during a tour of the Draper prison unit. (A. 143). These experiences plus other problems encountered in the work release and youth centers where women guards are used in contact with male inmates, firmly support the Board's decision to limit contact between guards and inmates of the opposite sex in penitentiaries. (See Argument III (B) (3).)

Appellants readily agree, as the court below stated, that "women do not need protectors." (See Jurisdictional Statement at 37). Nevertheless, any employer would be remiss if he assigned his employees, or allowed them to assigned, whether they be male or female, to positions of unreasonable danger. In an all male maximum security prison, the disruptive influence caused by a female guard in close contact with the inmates should be a matter of innate recognition. No doubt a trained female guard is better equipped physically and mentally to deal with the confrontations imminent in a prison than would be a college coed. However, as all of plaintiff's experts pointed out, guards are an extreme minority in a prison requiring the use of psychological methods as a first defense. In such an environment, the weaknesses of a guard, whether perceived or real, are equally detrimental to control of institution, protection of inmates, aid to fellow guards, and self-preservation. These very real concerns of the Alabama Board of Corrections justify Regulation 204.

Plaintiff's evidence does little to impeach these conclusions. Mr. Raymond Nelson, called as an expert for the plaintiff, testified from his six months experience with the use of women in a single cell non-penitentiary institution. (A. 193). As he stated, women had been beneficial in many

ways at that institution. (A. 194). The institution was described as having non-communal toilets with private showers, single cell sleeping accommodations, and populated by inmates with generally less than one year remaining to serve. (A. 206). When he was asked in a hypothetical about the use of women in a facility similar to the Alabama penitentiaries he expressed serious reservations. (A. 196). The basis for his concern was obviously the contrast between his institution and a maximum security penitentiary with open communal toilet and shower facilities, and which houses long term inmates, 20% of which are incarcerated for sexual offenses. The latter type institutions are prevalent in Alabama. (A. 204).

Mr. C. Robert Sarver also testified for the plaintiff as an "expert". His testimony reveals that he has never supervised any women guards in a male prison institution, that he has made no particular study of their ability in such an environment, and that his only contact with such a situation was from a Florida jail he had briefly visited while preparing for another "expert" performance. (A. 87). Despite this obvious lack of experience in the matter, Mr. Sarver was undaunted in his favorable appraisal of the benefits to be gained from employing women guards in male penitentiaries. (A. 79). Appellants contend that this testimony adds little credible evidence to plaintiff's claim that Regulation 204 is unjustified.

Notwithstanding the obvious failing of plaintiff's case in this regard, the court below enjoined the enforcement of Regulation 204. In its opinion, the court found that the regulation was not consistent with the Board's position since women were in fact employed in contact positions at work release centers. The court makes no attempt to differentiate between the functions of a correctional officer or danger to such officers when supervising minimum security inmates of

proven adaptation to society, as opposed to those of proven vicious propensities in a penitentiary setting. The court's only concession to the Board's practical concerns was that the Department of Corrections could use selective work responsibilities among correction officers to preserve the privacy rights of inmates. However, no hint is given as to how this could be accomplised consistent with Title VII if not through a regulation just such as 204. Appellants propose that the lower court's finding is unsupportable. We submit that the procedures of Regulation 204 are job-related and that plaintiff has shown no other less offensive method that would serve the employer's legitimate interest with equal efficiency. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

CONCLUSION

For any court to declare invalid the statutory and regulatory products of a state's duly elected representatives and appointed agents is a grave undertaking. Only upon the most reliable grounds should such an endeavor proceed. This is especially concerning when the resultant order places final blame upon a state for fostering the social disease of discrimination.

Appellants urge that the court below misperceived the relevant legal, factual and moral considerations in the case at bar. We therefore ask this Court to reverse the holding of that court and reinstate the validity of both Title 55, §373 (109) Code of Alabama (1940) (Recomp. 1958) and Administrative Regulation 204.

Respectfully submitted,

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APPENDIX

AMENDMENT IX, CONSTITUTION OF THE UNITED STATES

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X, CONSTITUTION OF THE UNITED STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdication the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not

taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TITLE 42 U.S.C. § 2000e

Definitions

For the purposes of this title [42 USCS §§ 2000e - 2000e-17]—
(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS § 501(c)], except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State govern-

ment, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(July 2, 1964, P. L. 88-352, Title VII, § 701, 78 Stat. 253; Sept. 6, 1966, P. L. 89-554, § 8, 80 Stat. 662; Mar. 24, 1972, P. L. 92-261, § 2, 86 Stat. 103.)

Discrimination because of race, color, relgion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization. It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Religion, sex, or national origin as bona fide occupational qualification—Educational institutions with employees of particular religions. Notwithstanding any other provision of this title [42 USC §§ 2000e-2000e-17], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on

the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organization. As used in this title [42 USC §§ 2000e - 2000e-17], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USC §§ 2000e - 2000e-17], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any posi-

tion, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system—Ability tests. Notwithstanding any other provision of this title [42 USC §§ 2000e - 2000e-17], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USC §§ 2000e - 2000e-17] for any employer to differentiate upon the basis

of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)) [29 USC § 206(d)].

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USC §§ 2000-e - 2000e-17] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j)Preferential treatment not required on account of numerical or percentage imbalance. Nothing contained in this title [42 USC §§ 2000-2000e-17] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USC §§ 2000e - 2000e-17] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(July 2, 1964, P. L. 88-352, Title VII, § 703, 78 Stat 255; Mar. 24, 1972, P. L. 92-261, § 8(a), (b), 86 Stat. 109.)

CODE OF ALABAMA

TITLE 55, § 373(109) (1940) (Recomp. 1958)

Minimum standards for applicants and appointees as law-enforcement officers; employment of applicants; qualifications. — The minimum standards hereafter in this section provided shall apply to applicants and appointees as law-enforcement officers who are not law-enforcement officers in the state on the effective date of this article and to applicants and appointees who, though law-enforcement officers on the effective date of this article, cease to be law-enforcement officers before making application for employment as a law-enforcement officer or being employed as a law-enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on the effective date of this article a law-enforcement officer and who continues until the date of his application as a law-enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant and showing compliance with the following qualifications:

(a) Age. — The applicant shall be not less than 21 nor more than 45 years of age at the time of appointment; provided, however, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.

(b) Education. — The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.

(c) Police training. — Prior to appointment, the applicant shall have completed at least 240 hours of formal police training, in a recognized police training school, which shall include the Federal Bureau of Investigation Police Training Academy, or another training school approved by the Commission; provided, that an applicant may be provisionally appointed without having completed the police training herein prescribed subject to the condition that he shall complete such training within 9 months after provisional appointment and should he fail to complete such training, his appointment shall be null and void.

(d) Physical qualifications. — The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

(e) Character. — The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude, and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law-enforcement officer attesting his good reputation.

The foregoing requirements shall not apply to any person who is presently employed as a law-enforcement officer in the state and who continues to be so employed when he makes application for or is employed as a law-enforcement officer in a different capacity or for a different employer. (1971, No. 1981, p. 3227, § 7, appvd. Sept. 20, 1971; 1971, 3rd Ex. Sess., No. 156, p. 4399, § 1.)

Selective Certification

Correctional Counselor I Positions

1. GENERAL

1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective cerification for appointment of either male or female employees from State Personnel Department registers.

2. Appointment of employees for Correctional Counselor I positions are initially made from the Correctional Counselor Trainee register. They remain in a Trainee status for six months, at the end of which time they are promoted to Correctional Counselor I if they have satisfactory completed all phases of their training.

3. The policies and procedures established by this regulation have been coordinated with the Director of the State Personnel Department.

II. POLICY

4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective

certification for appointment of either a male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 45-2000c of the United States Code as interpreted by the General Council of the Equal Employment Opportunity Commission's letter dated January 13, 1976, attached as Annex A.

5, Selective certification from the Correctional Counselor Trainee register will be requested of the State Personnel Department whenever a position is being filed which has been designated for either a male or female employee only.

6. The Commissioner has final authority to approve the designation of an institutional Correctional Counselor I position which requires selective certification.

7. The Associate Commissioner for Administration is responsible for requesting all Correctional Counselor Trainee registers from the State Personnel Department.

III. PROCEDURE

8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certification and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluation, and submission to the Commissioner for final decision.

9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary;

A. That the presence of the opposite sex would cause

disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor Trainee registers without regard to sex.

IV. APPLICATION

11. The policies and procedure established by this regulation do not affect current appointments in Correctional Counselor classes nor does it affect the power of the Commissioner to hire or discharge any employee.

V. REFERENCES

12. Title 45-2000C, United States Code

13. Letter from the General Council of the Equal Employment Opportunity Commission.

J. C. LOCKE, JR.
Commissioner

Annex A—(Same as No. 13)

Mr. J. C. Locke, Jr.
Commissioner
State of Alabama
Board of Corrections
Montgomery, Alabama 36104

Dear Commissioner Locke:

We have received your letter dated October 6, 1975 requesting an advisory opinion with regard to hiring only female correctional counselor trainees to work in all-female prisons, and only male correctional counselor trainees to work in all-male prisons.

We have noted in your letter that you are being funded by the Law Enforcement Assistance Administration (LEAA) to hire and provide training for correctional counselor trainees; that male correctional counselor trainees who are employed at all-female prisons are in non-contact slots (outergate and tower), and female correctional counselor trainees who are employed at all-male prisons are in non-contact slots (outergate and tower); that the job at issue calls for frequent inspection and patrol of restrooms and showers thereby invading the privacy of prisoners, and would place female employees in all-male prisons in danger of sexual or other attack due to sexual deprivation; that no firearms are carried by correctional counselor or security personnel; and that there is a low ratio of security personnel to inmates.

Please note that this letter is not an opinion letter pursuant to 29 C.F.R. §1601.30.

Section 703 (e) of Title VII of the Civil Rights Act of 1969, as amended, 42 U.S.C., 2000e-e), states as follows:

Notwithstanding any other provision of this title,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise . . .

The regulation at 29 C.F.R. §1604.2, 37 F.R. 6836 (April 5, 1972) states as follows:

(a) The Commission believes that the bona fide occupation exception as to sex should be interpreted narrowly. Labels—'men's jobs' and 'women's jobs'—tend be deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characteristics of the sexes . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities

and not on the basis of any the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

Many courts have interpreted the statute and regulations dealing with sex discrimination and the B.F.O.Q. exception.

Relevant Case Law

In cases analagous to the one at issue, courts have held that employers may rely upon the B.F.O.Q. exception in order to employ or to assign like-sexed employees to work with inmates in corrcetional institutions.

There are several cases which you should examine which are helpful in the analysis of the question you raise.

In *Long v. State Personnel Board,* Calif. Ct. App. 116. No. Cal. Rtpr. 562 (1974), 8 EPD Para. 9745, the court held that under Title VII,[1] there was no sex discrimination, due to application of the B.F.O.Q. exception, where the state refused to hire a female chaplain to work at an all male youth correctional institution. The Court said that generally there are three overall interests to consider: plaintiff's interest, the wards' interest and the public interest. The Court considered the safety problem for the female chaplain who would be counselling, frequently, quite far away from male employees, youths whose average age was 19½ and whose physical control could not be guaranteed. The Court also considered the element of privacy of the inmates who lived in

[1] The Court also found no violation under the Federal or State Constitutions.

various states of undress in their dormitories where the chaplain would be expected to be from time to time. Also see *City of Philadelphia v. Pennsylvania Human Relations Commission* 7 Pa. Commonwealth 500, 300 A2r-97 (1973), 5 EPD Para. 8538, where the Court held that under a state law where the definition of B.F.O.Q. was intended to be the same as the one under Title VII, the state must grant the City of Philadelphia a B.F.O.Q. exception for youth center supervisor jobs, allowing the city to hire only like sexed supervisors for single sexed youth correctional institutions. In this case, although the Court discussed and was concerned about danger to employees and the privacy of the inmates it was also concerned about the age of the inmates and their special counselling and privacy needs.

In *Reynolds v. Wise*, 378 F. Supp, 147 (N.D. Texas 1974) 8 EPO Para. 9778, the Court held that a female employee at a state correctional institution for adult males had to be returned to her job in the mail room which had previously been filled by a man who was given a rotation every six months, which rotation involved counselling and other contact with the inmates. The female was to be given these extra assignments when returned to the previous mail room job in the order to prepare her for promotions, but the Court also noted the following:

> Selecting work responsibilities among correctional officers excluding from the duties of women assignment to dormitories or shake-down is reasonable to insure privacy of inmates and does not discriminate against women. *Reynolds v. Wise, supra* at 151.

In those cases discussing correctional work done outside an institutional setting, the Courts examine the nature of the work. In *Button v. Rockefeller*, 6 EPD Para. 8835,

(N.Y. Sup. Ct. Sept. 10, 1973) a case brought under the New York Executive Law Section 296, the Court held that the State's hiring of four women as state troopers whose scores were below the scores of a male applicant, was not discriminatory because women were needed in order to search other women and do undercover work. On the other hand, the Court in *Tracey v. Oklahoma, Dept. of Correction*, § EPO Para. 9713 (W.D. Okl. May 23, 1974) found that there was nothing in the nature of the jobs as probation or parole officers which would justify using separate hiring lists. The Court found that these jobs did not fit within the B.F.O.Q. exception.

Although not concerning correctional officers, also of relevance to the question you raise is the case of *Hodgson v. Robert Hall Clothes, Inc.*, 473 F. 2d 589 (3rd Cir. 1973) 5 EPO Para. 8434, *ce t. denied* 414 U.S. 866 (1973), 6 EPO Para. 8861, wherein one question was whether or not the Equal Pay Act was applicable in a situation where sex-segregated job classifications were permissible as a B.F.O.Q. The Appellate Court noted the finding by the District Court that there was a valid reason for having a sex segregated sales force, which was "the frequent necessity for physical contact because the sales persons and the customers which would embarrass both and would inhibit sales unless they were of the same sex." *Hodgson v. Robert Hall Clothes, Inc., supra* at 592 citing District Court opinion at page 1269.[2]

Conclusion And Recommendations

The statute, regulations and cases under Title VII sug-

[2] But see **Cianciolo t/a Galaxy Massage Parlor v. Members of City Council, Knoxville, Tennessee** 376 F.Supp. 719 (E.D. Tenn. 1974), 8 EPD Para 9708 where the Court found that the city ordinance prohibiting bisexual massages was in conflict with Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e - 2.

gest that you carefully evaluate each assignment in order to determine whether the B.F.O.Q. exception would apply. Some guidelines for you to consider when making your determination are as follows: the public interest and the interest of employees in minimizing danger, and the interest of the inmates in their own personal privacy. It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions. Wherever possible, these employees should be given the opportunity to perform their work with the state's firm guidance on curtailment of assignments which endanger the employees, the public and/or invade the personal privacy of the inmates. Since counselling should be stressed in order to upgrade the jobs involved, it is suggested that you can provide areas where employees and inmates can benefit from this part of the work, without regard to the sex of the employee or inmate.

If you need further information in the future, please do not hesitate to write again or to call.

Sincerely,

ABNER W. SIBAL
General Counsel

CERTIFICATE OF SERVICE

I, Walter S. Turner, Assistant Attorney General of Alabama, one of the attorneys for appellants, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 24th day of January, 1977, I served the requisite number of copies of the foregoing Brief of Appellants upon the attorneys for the appellee, by mailing the same to them, first-class postage prepaid, and addressed to them as follows:

Honorable Pamela Horowitz

Honorable John Carroll

Southern Poverty Law Center
1001 South Hall Street
Montgomery, Alabama 36101

I further certify that I also this date served in same fashion the Solicitor General of the United States, Department of Justice, Washington, D. C., 20530 pursuant to Rule 33(2)(b).

WALTER S. TURNER
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